***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF & APPENDIX

74-2361

UNITED STATES COURT OF APPEALS
For the Second Circuit

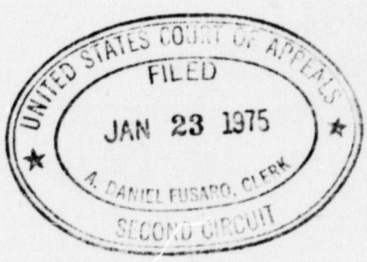
UNITED STATES ex rel. JAMES W. ROGERS,
Relator-Appellant, No. 74-2361

-against-

J. EDWIN LaVALLEE, WARDEN,
Respondent-Appellee

B
P/S

Appendix
BRIEF FOR RELATOR-APPELLANT

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## Statement of the Case

This case is an appeal from a denial of a writ of habeas corpus in the U.S. District Court below. This case began in the Kings County Supreme Court for the State of New York Indictment No. 217 of 1969 for which the defendant was charged with four counts including:

1. Felony Murder in violation of 39 McKinney's §125.25 (3)
2. First Degree Murder in violation of 39 McKinney's §125.25 (1)
3. Kidnapping in the first degree in violation of 39 McKinney's §135.35 (2), that is, to restrain a person for a period of more than ten hours with intent to inflict physical injury upon him or violate or abuse him sexually.
4. Kidnapping in the first degree in violation of 39 McKinney's §135.25 (3). That is, where the abducted person dies during the abduction.

The jury returned a verdict of not guilty in the first three counts as well as on the lesser included offense of kidnapping in the second degree in violation of 39 McKinney's 135.20. (Trial Transcript 1593) After further deliberation they returned a deadlocked verdict on the fourth count for which the first court declared a mistrial. (Trial Transcript 1596) Before retrial, defendant unsuccessfully sought an order of prohibition against a second trial on double jeopardy grounds. The petition was denied without prejudice. Defendant attempted to renew this motion immediately before retrial, but this motion was denied [second Trial Transcript pp. 4-8]. He was then retried solely on the fourth count and convicted. This conviction was affirmed without opinion by the Appellate

Division, Second Department 36 App. Div. 2d 1024, 321 N.Y.S. 2d 1021 (1971), leave to appeal to the New York Court of Appeals denied, petition for certiorari to the United States Supreme Court denied, 405 U.S. 956, (1972).

On July 2, 1971, petitioner sought habeas corpus relief in the lower court on double jeopardy grounds. (U.S. ex rel. Rogers v. LaVallee 71 C.V. 403 C.N. D.N.Y. 1971). There was considerable confusion both as to the facts and as to the exact nature of petitioner's constitutional claim and relief was denied on the grounds of factual insufficiency. On appeal to the Second Circuit Court of Appeals the petitioner was remanded to the District Court to dismiss for want of exhaustion of State remedies. U.S. ex rel. Rogers v. LaVallee 463 F. 2d 185 (2d Cir. 1972).

Petitioner then pursued his state remedies by seeking a writ of habeas corpus in the Supreme Court, Kings County. The writ was denied and leave to appeal to the Appellate Division, Second Department was denied (April 10, 1973, N.Y. L. J. at 20).

Thereafter, defendant filed a petition for a writ of habeas corpus in the lower U.S. District Court for the Northern District 73-CV 459 on the grounds that the first trial barred the second on double jeopardy grounds, which was denied by the Court, Judge Edmund Port presiding on August 29, 1974. See attached: Appendix A.

## Statement of Facts

1st Trial Oct, 1969

Mr. Rogers was tried in the Kings County Supreme Court for the State of New York on four counts including:

1. Felony Murder of Delia Mott in the course of committing the Crime of Kidnapping
2. Murder in the first degree
3. First Degree Kidnapping with intent to cause physical harm and to sexually abuse
4. First Degree Kidnapping where the victim dies.

At the close of the case, the Court, Hon. Franklin W. Mortion Jr. presiding instructed the jury to consider the chain of offenses in order of the counts in the following manner. He first instructed the jury to consider the first count of felony murder [T. 1523]. He then informed them that whether or not they found the defendant guilty of felony murder, they could consider whether the defendant committed first degree murder charged under the second count [T. 1523]. Only if the defendant was found not guilty under the second count need the jury proceed to the lesser included offense of manslaughter in the first degree [T. 1526]. If the defendant is found not guilty of manslaughter 1, then the jury may consider second degree manslaughter. [T. 1528]. If the defendant is found guilty of manslaughter in the second degree, they may convict him but if he is found innocent, then the jury must proceed to the third count of the indictment [T. 1529]. The Court properly informed the jury that the elements in the third count, first degree kidnapping, require an abduction, if the person in question, a period of restraint for more than twelve hours under intent to inflict physical injury upon the person or to violate her sexually [T. 1530]. He then informed the jury that if they find this act beyond a reasonable doubt, they may convict, otherwise they must acquit and proceed to consider

kidnapping in the second degree. [T. 1532]. He then informed the jury that kidnapping in the second degree only requires the element of abduction of the person in questions. [T. 1532]. The Court defined abduction as the restraint of a person with intent to prevent his liberation by either secreting or holding him in a place where he is not likely to be found or using or threatening House deadly physical force [T. 1530]. If the jury does not find sufficient evidence then they must acquit and proceed to the fourth count [T. 1532] which is kidnapping when the person dies during the abduction. [T. 1533] The Judge defined the elements of the fourth offense as

1. The defendant did abduct the victim in question and
2. The victim died during the course of the abduction,

If guilt is not found, then the jury is to proceed to the lesser included offense of second degree kidnapping which the court defines in exactly the same manner as previously [T. 1535].

In other words, the Court ordered the jury to consider the offenses in the following order:

1. Felony Murder
2. 1st degree murder
3. 1st degree manslaughter
4. 2nd degree manslaughter
5. 1st degree kidnapping
6. 2nd degree kidnapping
7. 1st degree kidnapping when death of the victim occurs
8. 2nd degree kidnapping of which they were to consider in ascending order, each count to be reached only if the verdict on the previous count was found to be not guilty except for the first count where the jury could proceed after a finding of guilty to consider the others.

Both the defense and the prosecution announced they had no exceptions to the instructions [T. 1573] and no requests [T. 1574]. After some deliberation and listening to some testimony repeated, the jury requested to hear the kidnapping instructions repeated [T. 1580]. The Court repeated these instructions, clarifying that kidnapping in the second degree required no minimum time period for the duration of abduction [T. 1583]. The jury returned again to return a verdict of not guilty on three counts including the lesser included offense of kidnapping in the second degree [T. 1593] and announced that they were deadlocked on the fourth count [T. 1594]. The Court returned the jury to reconsider the fourth count and the jury later returned stating they were still unable to reach a verdict. [T. 1596]. The jury was then polled. [T. 1596-7]. The Court then inquired only whether the District Attorney had objection [T. 1597] without inquiry of the defendant or his counsel. The court found that the jury did not agree [T. 1598].

Second Trial

Before trial the defendant filed a writ of prohibition that retrial constituted double jeopardy under the circumstances. The court denied without prejudice to be determined by the trial judge [T.$_2$ 4-8]. The motion was denied by the trial judge. The prosecution then proceeded to put on nearly all of the same witnesses to prove the same facts [T.$_2$ 1-415a]. At the close of the trial defendant renewed his objection that the second trial constituted double jeopardy because the witnesses and the evidence were the same as the first trial [T.$_2$ 404].

In the lower federal court, the facts were stipulated from the transcripts [T.$_2$ page 2].

I. A FINDING OF NOT GUILTY OF A CHARGE BARS RETRIAL OF THE CHARGE

Benton v. Maryland 395 U.D. 784, 23 L.Ed. 2d 707 89 S.Ct. 2056 (1969) establishes that the 5th Amendment Constitutional prohibition against placing a defendant in double jeopardy applies to the States through the 14th Amendment. The Government cannot appeal because of errors and then retry the defendant Kepner v. U.S. 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1905). Nor can the government ask for a mistrial midtrial because they want to enhance their case (in this case by summoning a witness for whose presence they neglected to arrange.) Downum v. U.S. 372 U.S. 374, 83 S.Ct. 1033 (1963). It does not matter whether the trier of fact is the jury or the judge or even whether the trier of fact denotes his activity as trying fact. Fong Foo v. U.S. 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed. 2d 629 (1962), U.S. v. Jenkins. The double jeopardy provision applies even where the defendant attacks his conviction on appeal and is granted a new trial U.S. ex rel. Heteny v. Wilkins 348 F. 2d 844 (1965). Where the jury is silent as to a greater count, it is presumed innocent. Green v. U.S. 355 U.S. 184, 2 L.Ed. 2d 199 78 S.Ct. 221, 61 A.L.R. 2d 1119 (1957). Price v. Georgia 398 U.S. 323, 90 S.Ct. 1759, 26 L.Ed. 2d 300 (1970). The Green Court said at p. 204

> The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The exercise of double jeopardy works only to the defendant's advantage. Thus where a defendant was tried for robbery and convicted for which he is retried after reversal on appeal, and

he is then acquitted, in a later charge for robbing someone else in the same transaction, the state is collaterally estopped from the case in which he was acquitted, not convicted Simpson v. Florida 403 U.S. 384, 29 L. Ed. 2d 549, 91 S.Ct. 1801 (1971).

In this case the second degree kidnapping charge had been adjudicated once. Thus, the court was barred from trying it again, and this is what happened in the second trial when second degree kidnapping was a lesser included offense of the first degree kidnapping for which Mr. Rogers was retried.

II. AN ELEMENT OF AN OFFENSE PREVIOUSLY DETERMINED AND ACQUITTED IN ONE CHARGE (HERE SECOND DEGREE KIDNAPPING) BARS A SECOND PROSECUTION OF A DIFFERENT CHARGE WITH THAT SAME ELEMENT (HERE FIRST DEGREE KIDNAPPING)

It is well settled law that a single jury may render inconsistent verdicts. Dunn v. U.S. 284 U.S. 390, 52 S.Ct. 189, 76 2 Ed. 356 (1932) (Holmes, J.). U.S. v. Carbone 378 F.2d 420 (2nd Cir. 1967). However, subsequent juries are not given that same prerogative due to our double jeopardy ban Ashe v. Swenson 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970). This is true even when the prosecuting authorities and/or the courts are different and have different jurisdictions Waller v. Florida 397 U.S. 387, 25 L.Ed 2d 435, 90 S.Ct. 1184 (1970) Robinson v. Neil 409 U.S. 505, 35 L.Ed. 2d 29, 93 S. Ct. 876 (1973).

The test for whether a prosecution is barred varies. Sometimes the same evidence test is applied Harris v. Washington 404 U.S. 55, 30 L.Ed. 2d 212, 92 S.Ct. 183 (1971); Turner v. Arkansas 407 U.S. 366, 32 L.Ed. 2d 798, 92 S.Ct. 2096 (1972).

Sometimes a transaction test is applied. Green v. U.S. supra. Either test fits squarely under the facts of this case where exactly the same transaction and exactly the same evidence is used in the second trial.

Only one Supreme Court case dealt with an acquittal and a mistrial by the same jury. In U.S. v. Williams 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758 (1951) J. Black in a separate concurring opinion states that where some of the elements of the mistrial count are the same as the acquittal count, that the doctrine of res judicata bars a retrial on the mistrial count. The acquittal was a final determination. So here any doubts should be resolved in favor of the defendant U.S. ex. rel. Russo v. Superior Court of New Jersey, etc. 483 F.2d 7 (3rd Cir. 1973).

III. THE TRIAL COURT SHOULD NOT HAVE GRANTED A MISTRIAL

Thus retrial of a person for the same offense has only been allowed when there is a manifest necessity. U.S. v. Perez 22 U.S. 579, 9 Wheat. 579, 6 L.Ed. 165 (1824). One example of such a manifest necessity would be a hung jury. Ibid. Also, the bias of one of the jurors constitutes manifest necessity Thompson v. U.S. 155 U.S. 271, 39 L. Ed. 146, 15 S.Ct. 73 (1894). Manifest destiny has been recently extended to include minor technical errors when there can be no possibility of prosecutorial manipulation, where no evidence has been presented and where the public justice considers vastly outweigh the inconvenience to the defendant. Illinois v. Somerville 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973). Also, where the trial court is merely protecting the defendant's interests, it is not Constitutional error. Gori v. U.S. 367 U.S. 364 (1961). One purpose of this rule is to prevent

the prosecutor from discontinuing a trial when it appears the jury will not convict Green v. U.S. 355 U.S. 784, 78 S.Ct. 221, L.Ed. 2d 199 (1957). Here, where the defendant did not give consent, nor was inquired of, and where the record showing only that the jury was currently unable to agree, but not that they had finished all fruitful discussion, there was no manifest destiny.

## CONCLUSION

Wherefore Mr. Rogers respectfully requests this Court to reverse the lower Court's denial of the petition for a writ of habeas corpus and to order the petitioner released because the second trial convicting him of 1st degree kidnapping violated Mr. Rogers right against double jeopardy

a) Because he had already been found not guilty of a lesser included offense and

b) Because the lower court abused its discretion in in declaring a mistrial.

Respectfully submitted,

1/16/25 Lois R. Goodman

LOIS R. GOODMAN
Counsel for Appellant

CERTIFICATION OF SERVICE

I hereby certify that a copy of this brief was served by prepaid mail on Margery Evans Reifler, Deputy Assistant Attorney General State of New York Department of Law, Two World Trade Center, New York, New York 10047.

1/16/75 Lois R. Goodman

Lois R. Goodman
Counsel for Appellant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES ex rel. JAMES W. ROGERS,

Petitioner

vs.

73-CV-459

J. EDWIN LA VALLEE, Warden, Clinton Prison, Dannemora, N. Y.,

Respondent.

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EDMUND PORT, Judge

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Memorandum - Decision and Order

An earlier application by the same petitioner for a writ of habeas corpus upon the same grounds as presented herein was dismissed by me for factual insufficiency by Memorandum-Decision and Order dated August 31, 1971.[1] On appeal to the Second Circuit, the action was remanded to this court with directions to dismiss the petition, without prejudice, for the failure to exhaust state court remedies. United States of America ex rel. Rogers v. LaVallee, 463 F.2d 185 (2d Cir. 1972).

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[1] United States ex rel. Rogers v. LaVallee, 71-CV-403 (N.D.N.Y. 1971).

Upon remand, I issued an Order on Mandate[1] dated August 3, 1972, dismissing the action for failure to exhaust state court remedies. Petitioner then sought relief by a collateral proceeding in the Kings County Supreme Court, which was denied in an opinion by Honorable Vincent D. Damiani.[2] The Appellate Division, Second Department, denied leave to appeal on April 4, 1973.[3] Having exhausted state remedies, the petitioner filed the instant federal petition for habeas corpus in this court.

State court records were then obtained and examined, counsel assigned,[4] and time afforded for briefing and oral argument; the action was submitted, by stipulation, on the basis of oral argument, briefs, and the state court records. Its resolution has not been easy because, as indicated by Judge Feinberg:

> the crime involved is so repulsive,[5] the issue of state-federal relationship so delicate, and the double jeopardy claim so unusual and not without difficulty. United States ex rel. Rogers v. LaVallee, supra, at p. 187.

In addition, insofar as counsels' and this court's research indicates, the petition herein presents a case of first impression and is sui generis factually.

The factual background surrounding the petitioner's trial, re-

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[2] People v. Rogers, ind. no. 217/1969 (Sup.Ct. Kings Co. Feb. 8, 1973).

[3] A determination that is puzzling and inexplicable in view of the unique and difficult questions presented herein.

[4] For various reasons, the court was obliged to appoint three successive attorneys; one Cornell Law School professor and two Syracuse University College of Law professors, to represent the petitioner herein.

[5] The petitioner was charged with kidnapping a 19 month-old infant girl, sexually assaulting her, murdering her, and disposing of her nude body in a garbage can behind a supermarket.

trial, and appellate proceedings are set forth in the Second Circuit's decision and will not be restated herein in the interest of brevity. See United States ex rel. Rogers v. LaVallee, supra, at pp. 185-86. Each of the two contentions presented herein will be discussed separately.

DECLARATION OF MISTRIAL SUA SPONTE BY TRIAL JUDGE

Petitioner claims that the judge at his first trial acted improperly when he declared a mistrial, sua sponte, and that his second trial and conviction was prohibited by the Double Jeopardy Clause pursuant to United States v. Jorn, 400 U.S. 470 (1971). The Second Circuit indicated in its initial consideration of this case that this particular claim was "a weak one on the merits." United States ex rel. Rogers v. LaVallee, supra at p. 187. I am in accord. See United States ex rel Rogers v. LaVallee, 71-CV-403 (N.D.N.Y. 1971).

From the state records in this action, it appears that the trial lasted approximately fifteen days and that the jury deliberated for approximately two days after being sequestered overnight. During its deliberations, the jury was given additional instructions on four occasions and twice stated that it could not agree as to the fourth count of the indictment. After polling the jury, the trial judge, on his own motion and without objection from either the People or the defendant,[6] declared a mistrial as to the fourth count of the indictment

[6] It is uncontroverted that the defendant or his counsel failed to object to the declaration of a mistrial. In fact, the defendant may have consented to the same. The brief of the People in opposition to petitioner's application for a writ of certiorari to the Supreme Court states on page 15 thereof: "The Clerk's minutes state as follows: 'Both sides consent to a mistrial and the Court so orders it.'" This court has been unable to find that quotation from the Clerk's minutes in the state court records herein. Of course, if

and restored that count to the trial calendar.

United States v. Jorn, supra, holds that before a trial judge, sua sponte, declares a mistrial, he should exercise a sound and scrupulous discretion to assure that there is a manifest necessity for that action and that the ends of public justice would not be served by a continuation of deliberations. And see United States v. Castellanos, 478 F.2d 749 (2d Cir. 1973). Ordinarily, the retrial of an accused after a mistrial because the jury is unable to agree is not a denial of the constitutional right against twice being placed in jeopardy. See, e.g., Green v. United States, 355 U.S. 184 (1957); Wade v. Hunter, 336 U.S. 684 (1949); and United States v. Goldstein, 479 F.2d 1061, 1069 (2d Cir. 1973). This is particularly true when the defendant has failed to object to the judge's action. See United States v. Phillips, 431 F.2d 949 (3rd Cir. 1970).

In the instant case it is clear that the defendant did not object to the declaration of mistrial; further, he does not show that he was not given an opportunity to object as was the case in Jorn, supra.

For all the above reasons and based upon all the facts and circumstances disclosed upon an examination of pages 1575-1598 of the trial minutes[7] upon petitioner's first trial, and according all these factors their proper weight,[8] I hold as a matter of law that peti-

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consent was so given that would resolve this issue against the petitioner. See United States v. Goldstein, 479 F.2d 1061, 1066 (2d Cir. 1973).

In connection with the failure to object to the mistrial by defendant or his counsel, it should be noted that petitioner was not a novice to criminal proceedings and trials. The petitioner had been arrested on at least eight previous occasions, including the arrest for and full trial on a charge of raping and strangling to death his own nine-year-old daughter; he was acquitted of this charge after trial. See Sentencing Minutes of July 14, 1970 at pp. 16-19.

tioner's double jeopardy rights were not infringed by reason of the trial judge's declaration of a mistrial sua sponte upon his first trial.

ACQUITTAL OF KIDNAPPING 2ND DEGREE ON FIRST TRIAL

Petitioner was originally indicted in a four-count indictment in connection with the kidnapping and death of a nineteen-month-old baby girl, containing the following counts: (1) felony murder 1st degree; (2) common-law murder; (3) kidnapping 1st degree [abduction plus restraint for more than twelve hours with intent to inflict physical injury and to violate and abuse sexually]; and (4) kidnapping 1st degree [abduction plus death of the victim during abduction].

The problem in this case arises out of the manner in which the judge charged as to the lesser included offense of 2nd degree kidnapping. His charge required that the jury consider 2nd degree kidnapping as to the count of kidnapping 1st contained in count 3 and then consider 2nd degree kidnapping separately in connection with the charge of 1st degree kidnapping in count 4.[9]

He charged the jury that, if they found defendant not guilty of count 3 as to 1st degree kidnapping, to consider the charge of 2nd degree kidnapping. In spite of the fact that count 4, charging 1st degree kidnapping, resulting in the death of the victim, includes of necessity abduction, the jurors were instructed that, if they found

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[7] Containing the record of the trial proceedings from the commencement of the jury's deliberations to the judge's declaration of a mistrial.

[8] See, e.g., United States v. Goldstein, 479 F.2d 1061, 1068-69 (2d Cir. 1973).

[9] The pertinent part of the charge is set out in full as an appendix.

the defendant not guilty of 2nd degree kidnapping as a lesser included offense in count 3, to go on and consider kidnapping 1st as charged in count 4. The court then went further and charged the jury that, if they found the defendant not guilty as to kidnapping 1st as charged in count 4, they should then consider kidnapping 2nd as a lesser included offense of count 4. This was repeated in substance on two more occasions in response to requests for clarification from the jury. At no time did the defendant object.

The jury reported that it had found petitioner not guilty of counts 1, 2 and 3 [including both 1st and 2nd degree kidnapping], but reported that it was unable to agree on the charges of count 4 encompassing both 1st and 2nd degree kidnapping. After sending the jury back for further deliberations, which proved fruitless, the trial judge declared a mistrial as discussed earlier herein. At petitioner's second trial, he was found guilty of 1st degree kidnapping as stated in count 4 of the indictment.

Petitioner argues that because the jury on his first trial acquitted him of the lesser included charge of kidnapping 2nd degree [abduction only] under count 3 of the indictment, then the People were prohibited from retrying him on count 4 of the indictment for kidnapping 1st degree as abduction was an essential element of that offense; by so retrying and convicting him, petitioner claims that his double jeopardy protection was violated.

The unique and vexatious factual situation presented by this petition constitutes, as noted by the Second Circuit in a similarly unique double jeopardy case:

> a case that is sui generis, not controlled by any Supreme Court case on its facts, and not capable of simple resolution either on an historical or logical basis. Without disregarding the teachings of history or of the cases, we come to a point where we must weigh on a fine scale the competing interests of the public and petitioner. We must strike a balance between fairness to society in obtaining a verdict on a proper indictment and the avoidance of undue vexation to the defendant by a retrial . . .. United States ex rel. Jackson v. Follette, 462 F.2d 1041, 1049 (2d Cir. 1972).

If petitioner had simply been acquitted of kidnapping 1st degree under count 3 of the indictment and then later convicted of kidnapping 1st degree under count 4 of the indictment, the complex constitutional problem presented herein would not be present, as the elements of each kidnapping 1st degree charge were markedly different. The problem herein arises from the fact of his acquittal of kidnapping 2nd degree under count 3 of the indictment.

Petitioner contends that this court should recognize his acquittal of kidnapping 2nd degree under count 3, but at the same time disregard the jury's disagreement and their inability to come to a verdict on the same crime as charged in count 4. I am of the opinion, as was Judge Damiani in his state court determination, that the jury's verdict must be considered in its entirety and as a whole; to do otherwise would be to ignore entirely the clear fact that the "jurors were in effect saying in the same breath, 'we find the defendant not guilty' and 'we cannot agree.'" People v. Rogers, ind. no. 217/1969 (Sup.Ct. Kings Co. Feb. 8, 1973) at p. 6.

While making no effort to define what was in either the defendant's, the trial judge's, the counsels' or the jurors' minds,[10] there is little if anything to indicate that any of them considered the

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[10] Being mindful of the dangers involved in "conjecture as to the jury's mental gymnastics". United States v. Zane, supra, at p. 691.

jury's verdict on count 4 to be anything but what it was: a disagreement on count 4 as to kidnapping 1st and the lesser included offense of kidnapping 2nd under that count. Under the circumstances of this case "[t]to say that [the jury] . . . acquitted [Rogers of 2nd degree kidnapping] would be pure speculation."[11] Under the charge, the lesser included offense of 2nd degree kidnapping became part of the major offense to which it was tied; the 2nd degree kidnapping as the lesser included offense of count 3 differed from 2nd degree kidnapping as the lesser included offense of count 4 as much as count 3 differed from count 4. The charge, in effect, told the jurors the abduction which comprised the lesser included offense under count 3 was an abduction of at least twelve hours, while abduction as the lesser included offense under count 4 had no time restrictions. (See appendix.)

I am of the opinion that the jury's disagreement as to count 4 is entitled to at least as much weight as is the acquittal under count 3; the end result being that the jury brought in no more than a confused, inconsistent and repugnant verdict. It is black-letter law than even plainly inconsistent jury verdicts, rendered simultaneously, are the jury's prerogative and that such verdicts have no estoppel or res judicata effects. United States v. Zane, 495 F.2d 683 (2d Cir. 1974). Zane, supra, apparently extends this basic rule to inconsistent verdicts on separate counts rendered at different times under one indictment. See 495 F.2d at p. 690-91. The policy reasons for not disturbing inconsistent verdicts are amply set forth in Zane, supra, at 690-91.

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[11] 462 F.2d at 1052, Mansfield, C. J. concurring.

In the confused verdict rendered herein, it is obvious, to this court at least, that the jury did not render a dispositive, adequate or accurate finding as to petitioner's guilt or innocence of kidnapping 2nd degree. Accordingly, jeopardy should not attach to the jury's determination under count 3 nor should the doctrine of collateral estoppel[12] have prevented the People from retrying and convicting petitioner under count 4.

Further, it must be remembered that the petitioner and his counsel failed to object when the trial judge declared a mistrial, thereby allowing the jury's confused and inconsistent determination to stand uncorrected. It has been suggested that the consent of a defendant, or trial strategy amounting to such consent, may preclude the defendant from invoking the Double Jeopardy Clause upon a retrial. See the concurring opinion of Mansfield, Circuit Judge, in United States ex rel. Jackson v. Follette, supra, at pp. 1052-53.

While concerned with a factually different situation than is presented herein, Circuit Judge Lumbard's dissent in United States v. Jenkins, 490 F.2d 868, 884 (2d Cir. 1973)[13] presents considerations

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[12] See Ashe v. Swenson, 397 U.S. 436 (1970). For the doctrine of collateral estoppel to be operative, it is the defendant's burden to show that the jury's verdict in the prior trial necessarily decided the issues raised in the second prosecution. United States v. Gugliaro, docket no. 74-1378 at p. 4880 (2d Cir. July 19, 1974); United States v. Tramunti, docket no. 74-1398 at p. 4830 (2d Cir. July 12, 1974). For all of the reasons mentioned and discussed in this opinion and viewing the verdict herein as an entity and as a whole, I cannot find that the jury herein necessarily acquitted petitioner of kidnapping 2nd degree.

[13] Jenkins contains an exhaustive and complete analysis, historical and current, of the Double Jeopardy Clause and its origins.

and concerns which are applicable herein:

> Simply stated, it is my view that the Double Jeopardy Clause is not an abstract rule, but one that should be adapted and applied in light of the totality of circumstances of each particular case. As Judge Friendly's thoroughgoing history of the Clause reveals, its evolution has been clouded with contradictions, inconsistencies, and uncertainties. It would be a serious mistake slavishly to adhere to a rigid application of this fifth amendment protection. An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice.[7] Only last term, the Supreme Court in Illinois v. Somerville, 410 U.S. 458 (1973), rejected the notion that technical errors resulting in a mistrial should bar reprosecution. In such cases, the "ends of public justice" demand that "the purpose of law, to protect society from those guilty of crimes [not] be frustrated by denying courts power to put the defendant to trial again." 410 U.S. at 470.

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[7] For quite some time, legal commentators have urged a more flexible analysis in determining whether the Double Jeopardy Clause is applicable to the circumstances of a particular case. See generally Mayers & Yarborough, Bix Vexari: New Trials and Successive Prosecutions, 74 Harv.L.Rev. 1 (1960); Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965).

Weighing and considering the conflict between the petitioner and the People of the State of New York herein, the aims and purposes of the Double Jeopardy Clause, and after careful analysis of the peculiar and unique factual situation presented by the instant petition, and for all the other reasons mentioned herein, I hold, as a matter of law, that petitioner's rights under the Double Jeopardy Clause were not violated by reason of his retrial and conviction of Kidnapping 1st degree.

For the reasons herein it is

ORDERED, that the petition herein be and the same hereby is denied and dismissed. The Clerk is directed to file the papers herein without

the payment of fees, and leave to proceed in forma pauperis is granted. For the reason that this petition presents a case of first impression and in view of the unique and novel facts comprising the claims herein, a certificate of probable cause is hereby granted without further application; the Clerk shall file a notice of appeal if the same shall be forwarded to him: c/o United States District Court, Federal Building, Utica, New York, 13503.

Edmund Port
United States District Judge

Dated: August 29, 1974
Auburn, New York

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N.B. This court expresses its appreciation to Mr. Joseph E. Parisi, Chief Clerk, Criminal Term of the Kings County Supreme Court, Civic Center at Montague Street, Brooklyn, New York, 11201 for his courteous cooperation in forwarding to this court petitioner's state court records, both in connection with his direct appeal and his New York State collateral proceedings.

All of the state court records in this case are being returned directly by this court to Mr. Perisi.

ass't Atty General in Albany
Dept of Law 518-474-7206
Costellano - writs -
Tim O'Brien - Civil Rights

Now, in your deliberation under the third count, you must decide whether the People have proven beyond a reasonable doubt that the defendant James Rogers did abduct Delia Mott, did restrain Delia Mott, the abducted person, for more than a period of twelve hours and that he did so with intent to inflict physical injury and to violate and sexually abuse Delia Mott and that the defendant did accomplish the aforementioned physical injury or sexual abuse.

The same rules apply as I have stated to you under count number one and two of the indictment. You must find all these elements have been proven to

Jury Charge

you beyond a reasonable doubt in order to convict the defendant of the crime of kidnapping in the first degree under the third count; otherwise you must acquit the defendant and proceed to consider whether defendant committed the crime of kidnapping in the second degree.

Section 135.20 of the Penal Law states, "A person is guilty of kidnapping in the second degree when he abducts another person."

Now, I have just explained the definition of abduct stated in the law and therefore the only element necessary to convict the defendant of this crime is to determine whether the person Delia Mott was abducted.

If you find beyond a reasonable doubt that the defendant did abduct Delia Mott, then you must convict him of the crime of kidnapping in the second degree, but on the other hand if you believe that the People have not proven beyond a reasonable doubt the charge of kidnapping in the second degree, then you must acquit the defendant and proceed to the fourth and final count of the indictment.

Again the defendant is charged with the kidnaping, the crime of kidnapping in the first degree, but

this time under Subdivision 3 of Section 135.25 of the Penal Law which states: "A person is guilty of kidnapping in the first degree when he abducts another person and when the person abducted dies during the abduction."

Now, to convict the defendant under the fourth count of the indictment, the People must prove beyond a reasonable doubt that the defendant did abduct Delia Mott and that Delia Mott died during the abduction under the fourth count. If you find beyond a reasonable doubt that the People proved that the defendant did perform those two elements then you must convict the defendant. However, if you believe that the People have failed to prove to your satisfaction the elements which I have just described, then, of course, you must acquit the defendant under the fourth count of the indictment and then you may consider the lesser degree of the crime of kidnapping in the second degree, and I'll repeat that for you. "A person is guilty of kidnapping in the second degree when he abducts another person."

Now, I have just explained the definition of abduct as stated in the law and therefore the only element necessary to convict the defendant of the crime

of kidnapping in the second degree is for you to determine whether this Delia Mott was abducted by the defendant. If you find beyond any reasonable doubt that the defendant did abduct Delia Mott, then, of course, you must convict. On the other hand, if you find that the People have failed to prove that this defendant abducted Delia Mott, you must acquit him if they fail to prove beyond a reasonable doubt that such abduction took place.

APPENDIX (4

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

73-CV-459

D. C. Form No. 106 Rev.

| TITLE OF CASE | ATTORNEYS |
|---|---|
| UNITED STATES ex rel. JAMES W. ROGERS,<br>Petitioner,<br>-against-<br>J. EDWIN LaVALLEE, Warden, Clinton Prison, Dannemora, N. Y.,<br>Respondent. | For plaintiff: Gray-Thoron, Esq.<br>c/o The Auburn Legal Assistance Project<br>Cornell Law School<br>Ithaca, New York<br><br>Lois Goodman, Director, Syracuse University College of Law Project for Prisoners' Rights<br>Syracuse University<br>College of Law<br>Syracuse, New York 13210<br><br>For defendant: |

| STATISTICAL RECORD | COSTS | | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|---|---|---|---|---|---|---|
| J.S. 5 mailed | Clerk | | | | | |
| J.S. 6 mailed | Marshal | | | | | |
| Basis of Action: Petition for Writ of Habeas Corpus | Docket fee | | | | | |
| | Witness fees | | | | | |
| Action arose at: | Depositions | | | | | |

73-CV- 459

| DATE 1973 | PROCEEDINGS | Date Order or Judgment No. |
|---|---|---|
| Oct. 12 | (1) Filed Petition for Writ of Habeas Corpus | |
| Oct. 12 | (2) Filed Order to Show Cause returnable 11/12/73 at Syracuse and order granting the petitioner to proceed in forma pauperis | |
| Oct. 24 | (3) Filed Copy 5 of CJA 20 | |
| Oct. 24 | (4) Filed Order of Judge Port(10/22/73) relieving Gray Thoron as counsel for petitioner and appointing Robert M. Pitler,Esq., Syracuse University College of Law, Syracuse, New York 13210 | |
| Dec. 5 | (5) " Affidavit of Joseph R. Castellani | |
| " 5 | (6) " Copy of NYS IIS Sheet | |
| " 10 | Return of Order to Show Cause. Briefs to be exchanged by Feb. 1. One week to rep | |
| 1974 Jan. 24 | (7) Copy of CJA 20 Form (5) | |
| Sept. 3 | (8) Filed Memorandum-Decision and Order (8/29/74) denying and dismissing petition and directing papers be filed without fee, leave to proceed in forma pauperis granted. Certificate of Probable Cause is granted without further application and if Notice of Appeal is forwarded same shall be filed. | |
| " 3 | (9) Filed Petitioner's Brief | |
| " 9 | (10) " Notice of Appeal | |
| " 27 | (11) " Notice of appearance of Lois Goodman for Travis H.D.Lewin, Professor of L Syracuse, New York | |
| Oct. 7 | (12) Filed Consent & Order of Substitution of Attorney | |
| Oct. 16 | Forwarded certified Record on Appeal consisting of original papers to Clerk, U.S. C. A. | |
| Oct. 23 | (13) Filed receipt from C.C.A. 2nd Circuit | |

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a

duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

*Attorney for*

*Office and Post Office Address*

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

*Attorney for*

*Office and Post Office Address*

To

Attorney(s) for

Index No. Year 19

U.S. ex. rel James W. Rogers,
Relator=Appellant, No. 74-2361

-against-

J. Edwin LaVallee, Warden
Respondent-Appellee

Brief for Appellant

Lois R. Goodman

*Attorney for* Appellant

*Office and Post Office Address, Telephone*
Project for Prisoners' Rights
721 Ostrom Ave.
Syracuse, New York 13210
315-423-4463

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.
Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

s over 18 years of age and resides at being duly sworn, deposes and says: deponent is not a party to the action,

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

worn to before me on 19

.....
The name signed must be printed beneath